

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CRIMINAL SESSIONS CASE NO. 13 OF 2021

REPUBLIC

Versus

- 1. KHALID ALMAS MWINYI @ BANYATA**
- 2. RAHMA ALMAS MWINYI @ BABY @ RAHMA ALMAS
IDDI**
- 3. NDUIMANA OGISTE @ JONAS ZEBEDAYO @
MCHUNGAJI @ NDAYISHEMEZE ZEBEDE @
NDAISHIME ZEBEDAYO @ OMARI HASSAN**
- 4. GODFREY PETER SALAMBA**
- 5. CHAMBIE JUMA ALLY**
- 6. ALLAN ELIKANA MAFUE**
- 7. ISMAIL ISSAH MOHAMED @ MACHIPS**
- 8. LEONARD PHILIPO MAKOI**
- 9. AYOUB SELEMAN KIHOLI**
- 10. JOSEPH ALEXANDER LUKOA**
- 11. GAUDENCE JAMES MATEMU**
- 12. ABUU OMARY MKINGIE**
- 13. HABONIMANA AUGUSTIN NYANDWI @ OGISTEE**

14.MICHAEL DAUD KWAVAVA

15.EMMANUEL THOMAS SONDE

16.KELVIN ATHANAS SOKO

17.SAMIA SALEH HUJAT

18.ALMAS SWEDI @ MALCOM

R U L I N G

Date of Last Order: 16th March 2022

Date of Ruling: 17th March 2022

MGONYA, J

Before the court is the Prosecution witness known as **PW6 AF** who testified to the effect that he was the one who led the investigation team to where **Exh. P 3 - Exh. P. 15** was found and seized. After the said witness had identified the Seizure Certificate he prepared at the place where the said items were found of which included the items seized together with the names and signatures of the witnesses to the seizure exercise, together with the cement bag which was also found together with the said items; and upon request to tender the same for evidence before the court, the said prayer encountered a serious objection from the Defense team in their joint endeavors.

As both sides for and against the objection had lengthy submissions, let me assure both Prosecution and Defense Counsel

that I have carefully heard and also gone through their respective submissions and take note of the precedents they produced before the court. However, in the cause of writing this Ruling, I don't intend to reproduce Counsel's respective submissions but I will note their concerns briefly before I determine the objections raised.

The gist of the objection is non adherence of **section 38 (2) and (3) of the Criminal Procedure Act; [R. E. 2019]**. It was Defence concern that the Search Warrant and Seizure Certificate did not adhered to section 38 (2) of CPA which needs an Authority before search exercise to bring the Search Warrant to Magistrate. However, that was not the case in this matter; as the same one was not brought to the Magistrate before the Search and Seizure. Further the receipt was not issued in accordance to section 38 (3). Finally, that, as the used Twiga Cement which is before the court was nor listed in the said Seizure certificate, then the same cannot be admitted for evidence.

Submitting into detail, it is the Defence concern that section **38 (3)** of the **CPA** wants any police upon Seizing anything is entered/filled in the Seizure Certificate to give receipt to the person whom those items were found. Further, that as per **PGO 226** commands a Police Officer to pray for a permission from the Magistrate before of search. In support of this accession, the case

of ***SHABANI SAIDI KINDAMBA VS. R CIV. APPEAL NO. 390 OF 2009***, decided in June 2021, CAT Mtwara Registry (Unreported) was cited further defining section 42 CPA which is in relation of search without warrant and its circumstances.

Further the issuance of the receipt which under section 38 (3) of CPA was said to be mandatory, whereby the case of ***ANDREA AUGUSTINO MSIGARA AND ANOTHER Vs. R Criminal Appeal NO. 365/2018 CAT AT TANGA (Unreported)*** was cited.

In their submission, Defence was of the view that the Seizure Certificate further did not reflect the exhibits already admitted in court as the same has only listed five items, being: UZI Gun weapon, Rifle, Hand grenade (hand bomb), 162 UZI Gun bullets and 5 Rifle bullets. While in the said document the following items were not listed in the seizure certificate. The same are: there was no any Twiga Cement bag, Black bag, Kitenge, Thermos, socks and handkerchief.

From the above, it is the Defence team is concern that the Seizure Certificate is inconclusive and defective. And that procedure for search and seizure was not in accordance to law. In that respect, Defence prayed the Seizure Certificate together with

the Twiga cement used bag not to be admitted for evidence as prayed.

In response, it is the Prosecution is concern that the objections raise are misconceived and unfounded as the test for non-admission of evidence is whether that exhibit is not relevant, material and competent. And that if the exhibit sought is relevant and material then the witness is competent to tender the same.

Responding on non adherence of **section 38 (2) and (3)** of CPA, it is the Prosecution's view that Defence skipped to understand the meaning of the phrase "***As soon as practicable***" therein relating to the fact that the witness is said to have been searched and further seizure was conducted on **16/9/2016** which was **Saturday** where **no** Magistrate was procured for issuance of the permit prior those exercises. In the event therefore, the provision of section **38 (2)** in this case is said to have no effect practically.

Further on section **38 (3)** of CPA in respect of the a receipt which is said not to be issued to the person whose seizure was conducted here being Mr. Mohamed Maganga, the recent decision of 2021 of ***JUMANNE MPINI @ KAMBILOMBILO & ANOTHER VS. R CIVIL APPEAL NO. 195 OF 2020 AT KIGOMA*** particularly at pages 12 & 13 was cited and brought to the attention

of the court indicating that the same is not mandatory as those whose items were seized, were able to sign in the Seizure Certificate.

Lastly on the admission of the used Twiga cement bag that it has not been listed in the seizure document, Prosecution was of the view that the witness has laid foundation on the same, that they first saw it before they reached into other items as the same was just a package of weapons of which have already tendered and admitted in court. What matters was the weapons which are the subject matter before the court as the said exhibit is not strange to Defence.

In conclusion, it is the Prosecution's observation that the objections raised are baseless and have no legs to stand. Therefore, it is their prayer that the items tendered by the prosecution be admitted for evidence as prayed.

In view of the circumstances surrounding the matter, I am of the opinion that there are three issues to be determined.

1st is non adherence of **Section 38(2)** of the CPA as to whether the non-procurement of the Magistrate's permit as law requires nullifies the validity of the Seizure Certificate, `

2nd that non issuance of the receipt to the search and seizure victims in accordance to section **38 (3)** of **the CPA** also nullifies the validity of the exhibits found in that exercise and lastly,

Whether the admission of the used Twiga cement bag is admissible.

In the cause of determining the objections at hand, I will determine the 1st and 2nd issues above jointly. Starting with the noncompliance of section 38 (2), as well demonstrated by Defence, it is without question that section 38 and 40 of the CPA require a search warrant to be issued to a police officer or any other person who is authorized to do so before the contemplated search is conducted. This have clearly demonstrated in the case of ***SELEMANI NASSORO MPELI V REPUBLIC, Criminal Appeal No. 3 of 2018 (unreported)***. It is also a requirement under section **38 (3)** of the CPA for an officer who seizes anything in terms of section **38 (1)** of the Act to **issue a receipt** acknowledging the seized items to be signed by the occupier of the premises, near relative or other person who is for the time being in possession or control of the premises, together with signatures of other witnesses to the search. Besides that, section 42 of the CPA also permits the police officer or any other person so authorized, **under emergency circumstances to conduct**

search without warrant. Likewise, that **PGO No. 226** paragraphs 1(a) (b) and (c) and 2 (a) provides for the circumstances where the police officer can search without search warrant.

In this case, **PW6 AF** vividly explained the circumstances which led them to go Ngazija's cementry immediate after the 2nd Accused person's interrogation. Where upon search, the hidden items were recovered. Even if it is assumed, just for the sake of argument, that they ought to have had such a search warrant which was supposed to have the Magistrate's consent of which was not the case for the reason that, was not the working day, it could have been certainly, that the search and the seizure could have been conducted **in an emergency manner due to the nature of the weapons** and other explosive materials that were found underground particularly at the Centre of the town, being at Ngazija's cementry at Bibi Titi's Avenue/Road.

In *this case*, the witness (PW6 AF) clearly explained on how the said weapons and some explosive materials were found and seized in front of the 2nd Accused who directed them to the place where she left the items and before the immediate custodian Mr. Mohamed Maganga who was the immediate care taker of the same premises where the consignment was found. These two together

with other witnesses wrote their names and signed in the Seizure Certificate. Had it been the 2nd Accused refused to bring the team at that place, the explosives and the said weapons could have not been reached. PW6 AF's evidence was corroborated by PW5 AE respectively, who was an independent witness, who was called to witness the search and seizure. This witness also testified to the effect that he saw **Exh. P3 - P15** as he was able to identify them before the court.

The above reasoning has been well demonstrated in the case of ***PETER KABI AND LEONIDA LOI KABI V. R (Criminal Appeal No. 5/2020 delivered at Dar Es Salaam by CAT on 1st February 2022.***

From all these, it is my firm view that indeed the items were found at the place mentioned where the 2nd Accused brought the team. How can this court deny the fresh and factual evidential incident such as this against the procedure that was used and indeed which did not prejudice the immediate owner's rights as they were the ones who showed the Police what they had.

Indeed, failure to issue either Mr. Mohamed Maganga or the 2nd Accused with the receipt did not vitiate the Prosecution evidence. This is so because so far the evidence of **PW6 AF** and **PW5 AE** who both witnessed how the subject matter was seized

from Mgazija graveyard premises, and how the Certificate of Seizure was filled up and signed by those witnesses including the 2nd Accused herein as the person who brought the team thereto, it is my firm view that both the search and seizure were legal in the eyes of law.

From all that had happened and that which was skipped under the known situations and circumstances as clearly stated above, I wish to emphasize that it does not appear to this court that the omission to issue the receipt and also to obtain the Magistrate's permit **under the given circumstances**, was fatal. I say so because I prophase on **substantive justice and actual situations rather than on procedural rules especially when I am satisfied that the omitted procedure did not occasion any injustice so far to the persons concerned the same like this one.**

On the admission of the used Twiga cement bag, I see it wise not to admit it since it is not in the Seizure Certificate. Further for other items which were not listed in the Seizure Certificate such as Black bag, Kitenge, Thermos, socks and handkerchief, as far as they have already been admitted, their fate will be determined in the cause of judgment writing.

Consequently, the objection raised by Defense are hereby overruled and the **Seizure Certificate** before the court is eligible for admission for the reasons stated above.

It is so ordered.



L. E. MGONYA

JUDGE

17/3/2022